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84-1699

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

JOHN N. BROWN, Warden,
Oklahoma State Penitentiary,
McAlester, Oklahoma,
Petitioner,
v.
LARRY LEON CHANEY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a defendant's Motion to Produce, which requests all statements in the possession of the State, constitutes a general or a specific request for evidence.

2. Whether the United States Court of Appeals for the Tenth Circuit applied the correct test under United States v. Agurs in assessing whether the jury would have imposed the death penalty had the withheld evidence been disclosed.

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PETITION FOR A WRIT OF CERTIORARI TO THE
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The Petitioner, John N. Brown, Warden, Oklahoma State Penitentiary, McAlester, (hereinafter referred to as the "State"), prays that a Writ of Certiorari issue to review the Opinion and Judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The Opinion and Judgment of the United States Court of Appeals for the Tenth Circuit from which certiorari is sought was reported as Chaney v. Brown, 730 F.2d 1334 (10th Cir. 1984). See Appendix A & B.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The opinion and judgment of the United States Court of Appeals for the Tenth Circuit was filed on March 21. A timely Petition for Rehearing was denied in an Order filed on May 30, 1984. See Appendix C.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment to the United States Constitution provides in part:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

The Respondent, Larry Leon Chaney (hereinafter referred to as the "Defendant") was charged by Information in the District Court of Tulsa County, State of Oklahoma, with the crime of Murder in the First Degree in violation of Okla. Stat. tit. 21, § 701.7.

The Defendant was convicted of murdering a woman named Kendal Inez Ashmore by strangulation. In the second stage, the State introduced evidence that the

Defendant had also strangled a young woman named Kathy Ann Brown, who was a horse trainer in the employ of Mrs. Ashmore and who was kidnapped with her.

The facts that the State presented at trial revealed that on March 17, 1977, the deceased's husband, Phillip Ashmore, left his residence for work (Tr. 342-343). Mr. Ashmore was in the construction business (Tr. 337); and he and his wife also were engaged in the business of raising Morgan horses at their residence, which was on a farm (Tr. 338-341). Mr. Ashmore's wife, the decedent, Kendal Ashmore, came to his office at approximately 9:30 a.m. on March 17, 1977, and picked up the family pickup truck (Tr. 345). Mr. Ashmore never saw his wife alive again (Tr. 346).

After receiving a telephone call from one of his children, Mr. Ashmore returned to his home and found that neither his wife nor the employee, Kathy Ann Brown, were there (Tr. 347-349). After he rounded up the horses, Mr. Ashmore received a telephone call in which the caller stated that he had "got your old lady and that honky that works for you and I want a half million dollars in one hundred dollar bills . . . if anybody asks where your wife is you tell them she is out looking at Morgan horses." (Tr. 351). The caller promised to telephone the next night with instructions regarding the delivery of the money. The caller also stated that if anyone heard about the call, "I'll do to your wife what I did to that honky that works for you." (Tr. 351-352). Mr. Ashmore immediately called his attorney,

who then contacted the Federal Bureau of Investigation. A recording device was then affixed to his telephone, but no more calls from the extortionist were received on that day.

The next day, March 18, Mr. Ashmore and his father-in-law secured the ransom money and returned to the Ashmore home. At approximately 7:00 p.m., a person with the same voice called again (Tr. 358,363,364) and directed Mr. Ashmore to take the money to a rodeo ground and leave it at a specified location at a rodeo arena by 7:30 p.m. or his wife would be "dead" (Tr. 363). The rodeo grounds were approximately 2½ miles from the Ashmore home (Tr. 365) and within 2 miles from the Defendant's residence (Tr. 542-543). The caller also advised Mr. Ashmore that his truck was at 91st and Memorial (Tr. 363). This call was

tape recorded and played to the jury (Tr. 361-363).

Shortly after that time, Mr. Ashmore delivered the money to the predesignated spot at the rodeo grounds (Tr. 369-370). Later, at approximately 9:30 p.m. the same day (Tr. 371), he received another call from a man with the same voice (Tr. 371,373-374) who advised him that he had not left the money in the proper place, that he should pick up the money, and that he would receive another call the next day. The caller stated that if Mr. Ashmore did not do exactly as he was told, "I'm going to send back a big hunk of your old lady in a box to you in the mail, mother-fucker" (Tr. 373). This call was also tape recorded and played to the jury (Tr. 372). Mr. Ashmore did not receive any more calls concerning his wife.

The call which was made at approximately 7:00 p.m. (Tr. 411) directing Mr. Ashmore to the rodeo grounds and telling him that his pickup was at 91st and Memorial was traced to the Defendant's telephone number at his residence (Tr. 406,408,415). The last call, which was made at 9:27 p.m. (Tr. 424) was traced to a service station phone booth (Tr. 420-421). The Defendant's palmprint was taken from the receiver handle on that telephone (Tr. 431,452).

After receiving this information, the police set up surveillance at the Defendant's home, as stated previously, was within 2 miles of the rodeo grounds where the ransom money was to be delivered; and on March 19, at 3:20 a.m., the police arrested the Defendant and searched his house, looking for the

victims or evidence of the victims' whereabouts (Tr. 504-587).

A search of a wastepaper basket in the Defendant's kitchen revealed torn-up pieces of paper (State's Exhibits No. 18 and 30)[1], which, when reassembled, contained the words, "Richard Elloit, [sic] 1:00 P.M." and "Thursday" and the numbers "299-9791" and "9148: (Tr. 397, 579). The Ashmore's home telephone number, which was the number which the extortionist called (Tr. 408), was 299-9791 (Tr. 342); and the numbers "9148" are the numbers of the Ashmore street address (Tr. 397). A handwriting expert testified that the notations on the torn piece of paper found in the waste paper basket in the Defendant's residence were made by the Defendant (Tr. 1119). Fur-

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[1] State's Exhibit Nos. 18 and 30 are the same exhibit (Tr. 711).

thermore, the Defendant's fingerprints were found on this note (Tr. 588-589).

The pickup which Mrs. Ashmore had been driving was found at 91st and Memorial in Tulsa (Tr. 482-483), just as the caller had stated (Tr. 363) and which was the location noted in a note found at in the Ashmore pickup. This note was half of a piece of paper and was found on the seat of the pickup (State's Exhibit No. 12; Tr. 471). This note was in Mrs. Ashmore's handwriting (Tr. 381) with the words "1:00 Thur.," "91st and Memorial" and "Richard Elliot" and the numbers "581-3106" and "352" (Tr. 381-383,468-471; State's Exhibit No. 12). According to an FBI expert, the other half of the paper was found in the Ashmores' home (Tr. 588-589). Also found in the pickup was an Arby's Roast

Beef Sandwich wrapper (State's Exhibit No. 23; Tr. 454,478).

On March 22, 1977, the body of Mrs. Ashmore was found in a shallow grave on the Petitioner's property near the City of Sallisaw, a town approximately 100 miles each of Tulsa. Her hands were tied behind her back, she was gagged and she had been stragled with a strip of a towel (Tr. 727,825-830). The gravesite was roughly .4 to .5 of a mile from a campsite where the Defendant was building a cabin (Tr. 887).

The earth of the grave where Mrs. Ashmore's body was found had a crust on it which Undersheriff Art Lee testified was indicative of rainfall (Tr. 723). Mr. Lee also testified that a heel print appeared on the grave that appeared to have been eroded by rainfall (Tr. 723-724,735-736). A stipulation was

entered into which demonstrated that the only rain which fell in the Sallisaw area between March 17 and March 22 occurred between 7:00 a.m. and 7:00 a.m. March 17-18 (Tr. 711-712).

Mr. Lee also testified that a purse and billfold were found with the bodies; and they appeared to be damp, particularly the billfold, which he characterized as being "very damp" (Tr. 729-730).

Mrs. Ashmore's face revealed a "good deal" of lipstick and other makeup was visible (Tr. 740,742). She was wearing blue jeans with a crease in the leg (Tr. 741).

The State also presented witnesses who placed the Defendant in the area near where Mrs. Ashmore's body was found on the day of the kidnapping, including neighbors of the Defendant who saw the Petitioner driving a vehicle on that

property late on the afternoon of the kidnapping (Tr. 671-673,687-688). Furthermore, on the afternoon of the kidnapping, the Defendant was observed using a telephone in a convenience store near Sallisaw, within five or six miles of the burial site, by a witness who testified that the defendant appeared dirty and had dirt stains on his pants from the knees down (Tr. 695). Telephone records introduced by way of stipulation confirmed that a telephone call charged to the Defendant's residence (Tr. 793) was made from the grocery store to a Mr. James Holman, who also testified concerning the call and the fact that the Defendant had borrowed a pickup from him two days before the murder (Tr. 638-640,643).

Furthermore, on the night before the kidnapping, the Defendant checked into

a motel near Sallisaw (Tr. 650-653). The operator of the motel testified that, after the Defendant checked out the next morning, he found that three bath towels were missing and that there was red clay-like mud on the bedspread (Tr. 659,867-868).

Other witnesses testified concerning the Defendant's borrowing and then exchanging a four-whell-drive pickup for a 1967 Dodge pickup for use on his property on March 15 until he returned such on March 18 (Tr. 593-643).

The property where Mrs. Ashmore's body was buried was being rented by the Defendant, who was building a cabin at this location. A pick-ax which was found at the Defendant's Jenks residence when he was arrested was found to have soil particles on it consistent to

that at the grave where the bodies were buried (Tr. 777,783,884,893).

The autopsy of Mrs. Ashmore revealed that she had eaten approximately 2 hours prior to her death (Tr. 831). Dr. Hoffman, the pathologist, found that the stomach contents were similar to that of Arby's roast beef sandwiches (Tr. 831, 853). Dr. Hoffman stated that his findings were consistent with death six days prior to his examining the bodies (Tr. 832,863). He also observed lipstick and mascara on Mrs. Ashmore's face (Tr. 832). He stated that Mrs. Ashmore's skin had been in a moist atmosphere for a considerable period of time (Tr. 833).

A slide of Mrs. Ashmore's leg was also shown to the jury to show the lack of hair growth prior to the time of her death (Tr. 844,869-872).

The defendant called a number of witnesses, including several who testified concerning the Defendant's nonviolent reputation (Tr. 930,934,936).

The Defendant also called a pathologist, Dr. White, who claimed that the findings in his autopsy protocol were most consistent with Mrs. Ashmore having died no more than 24 to 48 hours prior to the autopsy (Tr. 1045).

The State then presented evidence that the handwriting on the torn note paper found in the Defendant's waste paper basket was that of the Defendant (Tr. 1119).

The jury found the Defendant guilty; and in the second stage of the proceeding, the State introduced evidence that Kathy Ann Brown, the horse trainer who had worked for Mrs. Ashmore and who also had been missing, had also been

bound, gagged, strangled and buried in the same grave with Mrs. Ashmore on the Defendant's property. The Defendant introduced evidence in mitigation, which included a stipulation concerning the Defendant's alleged heroism in saving a person from a burning truck on an earlier occasion.

The jury returned the verdict imposing the death penalty and found that four aggravating circumstances existed:

> "1. The defendant knowingly created a great risk of death to more than one person in that he did in fact kill, without authority of law, two persons, Kendal Inez Ashmore and Kathy Ann Brown, as the evidence shows.
>
> 2. The defendant committed the murder for remuneration or the promise of remuneration in that the evidence shows that the defendant kidnapped and killed both Kathy Ann Brown and Kendal Inez Ashmore and was attempting to extort $500,000 in money from the family of Kendal Inez Ashmore.

> 3. The murder was especially heinous, atrocious and cruel in that the defendant bound the victims and choked them to death with pieces of cloth and buried their bodies in a shallow grave.
>
> 4. The murder was committed for the purose of avoiding or preventing a lawful arrest or prosecution in that the evidence shows that the defendant killed the victims after kidnapping them in order to prevent them from testifying against said defendant for the kidnapping charge."

The jury specifically found the aggravating circumstances were not outweighed by any mitigating evidence which had been presented.

The Defendant perfected a direct appeal to the Court of Criminal Appeals of the State of Oklahoma, wherein the Oklahoma Court of Criminal Appeals affirmed the Defendant's conviction and sentence of death. Chaney v. State, 612 P.2d 269 (Okl.Cr. 1980).

Thereafter, the Defendant filed a Petition for Writ of Certiorari with the Supreme Court of the United States, which was denied by that Court. Chaney v. Oklahoma, 450 U.S. 1025 (1981).

On April 3, 1981, the Defendant filed his first Application for Post-Conviction Relief under Okla. Stat. tit. 22, §§ 1080 et seq. The Defendant's Application was based upon a contention that allegedly exculpatory evidence had been withheld by the prosecution. Hearings on this allegation were held before the trial judge, Judge Dalton, on May 1, 1981, and July 8, 1981.

At the May 1, 1981, hearing, the Defendant called one witness, the trial prosecutor, S.M. Fallis, who was the District Attorney of Tulsa County. The Defendant also introduced into evidence

a stipulation entered into with the State.

Mr. Fallis was questioned concerning 3 Federal Bureau of Investigation reports which had not been disclosed to the Defendant. One report concerned an alleged sighting of the victim, Kendal Ashmore, by a woman by the name of Poppy Weaver on the afternoon of March 17, 1977. According to the FBI report, Ms. Weaver allegedly stated that she saw Mrs. Ashmore in the City of Jenks at the time when two fire trucks and two police cars went by the store where she had stopped. The stipulation entered into between the defense and the prosecution verified that a fire alarm was responded to in Jenks at 4:08 p.m. on March 17, 1977.

A second report referred to a man, identified as a Mr. Hamilton, who ob-

served the Ashmore's pickup on the morning of March 18, 1977. According to the report, Mr. Hamilton observed a man leaving the pickup between 8:00 a.m. and 8:30 a.m. on that day.

A third report concerned a student named Kyle West who was riding a school bus and who observed a red pickup truck on March 17, 1977, at the location where the Ashmore pickup was later discovered.

Mr. Fallis explained the relevance of each report and each sighting (P.C. Tr. 23-31). After he testified, in response to the court's inquiry, the Defendant's attorney stated that he had spoken to Ms. Weaver, Mr. Hamilton and Mrs. West (the mother of the student, Kyle West; see Habeas Corpus (Tr. 7-8[2]), but advised the court that he had not

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[2] "Habeas Corpus Tr." refers to the hearing before Judge Brett on June 17, 1983.

called any of those persons to testify as witnesses (P.C. Tr. 38).

On the second hearing before Judge Dalton, on July 8, 1981, the Defendant requested that he be allowed to call as a witness Agent Tom McClain of the FBI, who took the statement of Poppy Weaver, referred to above. The trial court refused to call the witness and ruled that the testimony of the agent, viewed in the context of the entire trial, was not material (Order of July 17, 1981). The Court denied the Defendant's Application on July 27, 1981.

The Defendant appealed that Order to the Court of Criminal Appeals of the State of Oklahoma, which entered an Order Affirming Denial of Post-Conviction Relief on November 12, 1981, in Case No. PC-81-345.

From the Court of Criminal Appeals' denial of post-conviction relief, the Defendant again petitioned the United States Supreme Court for review by way of writ of certiorari, which was denied by the Supreme Court on April 5, 1982. Chaney v. Oklahoma, 456 U.S. 919 (1982).

Thereafter, the Defendant filed petition for Writ of Habeas Corpus before the United States District Court for the Northern District of Oklahoma, No. 82-C-625-B, the Honorable Thomas R. Brett. That Court dismissed the Petitioner's Petition for Writ of Habeas Corpus on June 25, 1982, under the authority of Rose v. Lundy, 455 U.S. 509 (1982).

The Defendant then filed another Application for Post-Conviction Relief which was again denied by the trial court on August 9, 1982.

The Defendant appealed that Order; and the Oklahoma Court of Criminal Appeals affirmed the denial of such on February 3, 1983, in Case No. PC-82-487. On May 19, 1983, the Court of Criminal Appeals issued an Order refusing to grant a Stay of Execution.

The Defendant then filed a third Petition for Writ of Certiorari with the United States Supreme Court, which was denied on June 6, 1983. On that date the Supreme Court also denied the Defendant's Application for a Stay of Execution. Chaney v. Oklahoma, ___ U.S. ___, 103 S.Ct. 2465 (1983).

On June 15, 1983, the Defendant filed the present Petition for Writ of Habeas Corpus in the United States District Court for the Northern District of Oklahoma. The Defendant also requested an evidentiary hearing with regard to

certain of his claims. On June 23, 1983, the District Court, the Honorable Thomas R. Brett, issued an Order overruling the Defendant's request for an evidentiary hearing.

Subsequently, on June 30, 1983, Judge Brett issued an Order denying the Defendant's Petition for Writ of Habeas Corpus. The Defendant appealed that Order to the United States Court of Appeals for the Tenth Circuit, which affirmed the Order of Judge Brett regarding the Defendant's conviction for Murder in the First Degree. However, the Court invalidated the Defendant's death sentence and it is from that portion of the Opinion and Judgment which the State seeks relief by way of certiorari with this Court.

REASONS FOR GRANTING THE PETITION

PROPOSITION I

THE DECISION OF THE TENTH CIRCUIT COURT OF APPEALS IS IN CONFICT WITH THOSE OF OTHER CIRCUIT COURTS OF APPEAL WITH REGARD TO THE ISSUE OF WHETHER A REQUEST FOR A "STATEMENT" IS A SPECIFIC OR A GENERAL REQUEST.

In its Opinion vacating the Defendant's sentence, the Tenth Circuit conceded that its decision was in conflict with that of the Seventh Circuit in United States ex rel. Moore v. Brierton, 560 F.2d 288 (7th Cir. 1977) ("To the extent that United States ex rel. Moore v. Brierton [citation omitted] is inconsistent with our holding that Chaney made a specific Brady request, we choose not to follow it. . . . We are convinced for the reasons discussed above, despite the Seventh Circuit's characterization of the request in Moore, that Chaney here made a specific

Brady request"). 730 F.2d at 1344, n. 15; A.___, infra. Other Seventh Circuit cases confirms this conflict. Cramer v. Fahner, 683 F.2d 1376, 1382-1383 (7th Cir. 1982); United States v. Mackey, 571 F.2d 376, 388-389 (7th Cir. 1978).

The State contends that the Tenth Circuit's Opinion is also in conflict with decisions in at least four other Circuits. See United States v. Cody, 722 F.2d 1052, 1062, n. 1 (1st Cir. 1983); United v. Martorano, 663 F.2d 1113, 1114 (1st Cir. 1981); United States v. DiCarlo, 575 F.2d 952, 958-960 (1st Cir. 1978); United States v. Menghi, 641 F.2d 72, 74, n. 1 (2d Cir. 1981); Ostrer v. United States, 577 F.2d 782, 786 (2d Cir. 1978); Wagster v. Overberg, 560 F.2d 735, 739-741 (6th Cir. 1977); United State v. Goldberg, 582 F.2d 483, 488-490 (9th Cir. 1978); United States

v. Weiner, 578 F.2d 757, 767 (9th Cir. 1978); United States v. Lasky, 548 F.2d 835, 839 (9th Cir. 1977).

In the present case the Defendant's Motion to Produce (Appendix D) is summarized in the Court's Opinion. 730 F. 2d at 1340-1342; A. 27-29. The Motion in essence requested statements of all persons who were interviewed by any government investigator. The Tenth Circuit found this request to be a specific one and held that the third test set forth in United States v. Agurs, 427 U.S. 97 (1976) should apply. The Tenth Circuit stated that since the withheld evidence "'might have affected' the jurors, or one of them in deciding the death penalty" the death sentence would be set aside. 730 F.2d at 1352; A. 87.

The State contends that it cannot conceive how any defense request for

exculpatory evidence could be more sweeping and general in nature. Furthermore, in addition to the previously cited cases which the State contends are in conflict with the present one, the State can see no distinction between this request and what the Court referred to as general requests in its Opinion. 730 F.2d at 1342-1343; A. 36-40.

For example, Tenth Circuit noted that in Hilliard v. Spalding, 719 F.2d 1443, 1444 (9th Cir. 1983), the Ninth Circuit had held that a request for "'all evidence known to the State which may prove the defendant's innocence'" constituted a general request. 730 F.2d at 1342; A. 36-37. However, the State contends that the only difference between that case and the present one is that the word "evidence" is used instead of the word "statements."

Since an investigatory file will consist entirely of "statements" (by witnesses, police officers, chemists, records personnel, pathologists, etc.) there is no difference between the words "statements" or "evidence" in either a practical or legal sense.

In Agurs the Supreme Court observed that a request for "all Brady material" or for "anything exculpatory" constitutes merely a general request. 427 U.S. at 106-107. It is the State's view that a request for all witnesses' statement is within this Court's definition of what should be a general request and that the Tenth Circuit erred when designated such to be a specific request.

Such a request is in reality a demand for the entire investigatory file. On the basis of this holding a defense attorney can now merely insert a request

in his discovery motion for "all statements of witnesses" and this will be held to constitute a specific request for all Brady material. This is hardly in accord with the holding of Agurs that a specific request gives the prosecutor "notice of exactly what the defense desire[s]." 427 U.S. at 106.

Additionally, the cases involving requests for exculpatory evidence reveal that the words "statements," "information," "evidence" and "material" are used interchangeably when seeking evidence in a prosecutor's possession. However, all of these words should be held to have the same meaning when evaluating whether a defendant's request is general or specific.

A review of the status of the different Circuit Court of Appeals decisions reveals that the Tenth Circuit's

Opinion is supported by three Circuit Court of Appeals (the Third, Fifth and Eighth[3]) A survey of the Court of Appeals decisions on this issue, that is, whether a defendant's motion to produce all statements, information, evidence, or material constitutes a general or a specific request follows:

CIRCUITS HOLDING SUCH A REQUEST TO BE GENERAL IN NATURE.

DISTRICT OF COLUMBIA

United States v. Mangieri, 694 F.2d 1270, 1288 (D.C. Cir. 1982). A statement by prosecutor, "[w]e have an understanding, of course, that in the event that any other documents turn up . . . I will turn them over" was held to be a general request.

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3 United States v. McCrane, 547 F. 2d 204 (3d Cir. 1976); United States v. Gaston, 608 F.2d 607 (5th Cir. 1979); and Scurr v. Niccum, 620 F.2d 186, 188 (8th Cir. 1980).

FIRST CIRCUIT[4]

United States v. Cody, 722 F.2d 1052, 1062, n. 1 (1st Cir. 1983). The defendant's pre-trial discovery motion requested:

> "Whether the government intends to call an informant or accomplice as a witness at trial. If so, please identify him . . . (d) any and all records, memoranda and correspondence between the witness and law enforcement authorities which might reasonably reflect on the witnesses' motives and relationship with the government."

It was further requested that the prosecution "[s]et forth all information and evidence, which would tend to excul-

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4 In Ziegler v. Callahan, 659 F.2d 254, 267, n. 6 (1st Cir. 1981), the First Circuit stated that "[t]his Court has not conclusively determined whethr a defense request for all prior witness statements constitutes a specific reqeust or a general request under Agurs. It is the State's position that the following cases do not support that observation.

pate the guilt of the defendant or mitigate the degree of the evidence or reduce the punishment which information and evidence is within the knowledge of the government or which by due diligence could be discovered by or made known to the government." The Court held that taken either separately or together, the requests were not specific.

United States v. DiCarlo, 575 F.2d 952, 958-960 (1st Cir. 1978), the defense request for:

> "All statements or promises or rewards of any kind, or tending in any way, directly or indirectly to induce or encourage the giving of testimony, which statements have been made to any persons whom the government intends to call as witnesses at the trial of the indictment herein," and "[a]ll evidence of any kind favorable to the defendants material either to guilt or punishment, including without limitation that which may tend to be exculpatory, to impeach or discredit incriminating evidence or to mitigate the crime charged, or which may lead to evidence of such character."

This was held to be a general request.

SECOND CIRCUIT

United States v. Menghi, 641 F.2d 72, 74 (2d Cir. 1981). The defense counsel requested:

> "All information concerning bad acts or crimes committed by the government informant not reflected in his arrest/conviction record. . . . Whether or not the government informant used drugs or was an addict. . . . Any evidence indicating non-reliability of the government informant . . . . Any evidence which would be used to impeach the credibility of the government informant or other government witnesses. . . . Any material relevant or useful to the preparation of the defense at trial. . . ."

The Court held that the request was general.

Ostrer v. United States, 577 F.2d 782, 786-787 (2d Cir. 1978). A defense request for "any other material in the possession of the government bearing

adversely on the credibility, character, and reputation of Michael Hellerman" (the government's witness), and "any other material relating to any matter which defense counsel could properly used in cross-examination to inquire into Hellerman's motive and bias in favor of the Government" was held to be a "boilerplate" and a general request.

SIXTH CIRCUIT

Wagster v. Overberg, 560 F.2d 735, 736-739 (6th Cir. 1977). A defense attorney requested:

> ". . . all evidence and testimony in his (prosecution's) possession which may be favorable to the defendant; in particular, we would like to have the results of all forensic tests, ballistics tests, fingerprint tests, blood tests - that being tests of the blood of the decedent. We would also like to have copies of any statements made by any person to the prosecution whom the defense will call as their witnesses in chief, and

> who we have been informed the prosecution shall also call in chief."

The Court held this request to be general.

SEVENTH CIRCUIT

United States v. Mackey, 571 F.2d 376, 388-389 (7th Cir. 1978). In a prosecution for attempted income tax evation and conspiracy to evade payment of income taxes, the defense requested "[i]nformation relating to material inconsistencies between statements given by any person, whether or not he is a prospective Government witness, and information relating to material inconsistencies between two or more persons, whether or not they are prospective government witnesses." The prosecution failed to provide defense with a copy of a transcript of an interview between an

I.R.S. agent and a government witness. The Court held that the request was general and that "[a]t a minimum," the defense is required to "focus his request of a particular witness" before the request could be held to be specific.

United States ex rel. Moore v. Brierton, 560 F.2d 288, 292 (7th Cir. 1977). The defense requested "written statements in the possession of the Lansing police chief, or the Chicago superintendent of police taken from any witnesses subsequent to the murder." This was held to be a general request.[5]

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[5] Significantly, this is the same case, Moore v. Illinois, 408 U.S. 786 (1972), in which the Supreme Court held that the suppressed evidence did not violate Brady principles.

NINTH CIRCUIT

United States v. Goldberg, 582 F.2d 483, 488-490 (9th Cir. 1978). The defense requested "any written or recorded statements . . . made by the defendants or by any alleged conspirators not charged herein, . . . any other statements made by the Government witnesses," "any 'inconsistent' statements by Government witnesses" and "any documents in the governments possession or which it may acquire later . . . which may fall under the Brady rule." The Court held that it was doubtful that this was a specific request, and that it was more likely that the notice it gave the prosecutor was scarcely better than if no request had been made.

United States v. Weiner, 578 F.2d 757, 767 (9th Cir. 1978). The Court denied defendant's oral motion during

trial for an order "requiring the government to lodge all SEC transcripts and statements and interviews with witnesses by the FBI," "the postal service, or anyone else that were in possession of the United States Attorney, for the Court's examination to ferret out possible Brady material." The Court held that under Agurs, the request was equivalent to no request at all and that the trial judge "need not accord the slightest heed to such a shotgun approach."

United States v. Lasky, 548 F.2d 835, 839 (9th Cir. 1977). The defense counsel "requested all probation reports, presentence interviews, and reports for 14 individual including David Stutler" (a co-conspirator who testified for the government). He further requested all "evidence favorable to him under the authority of Brady

. . . , including all information regarding police records, arrests, convictions, and any deals, promises or communications with government witnesses regarding benefits they may receive, or have already received, for testifying against defendant pursuant to Giglio, . . ." This was held to be a general request because it did not give "the prosecutor exactly what the defense desired. United States v. Agurs. . . ."

CIRCUITS HOLDING SUCH A REQUEST TO BE SPECIFIC IN NATURE

THIRD CIRCUIT

United States v. McCrane, 547 F.2d 204, 207 (3d Cir. 1976). The defense requested exculpatory material, or anything leading to exculpatory material, and "[m]aterial which may be used to impeach prosecution witnesses, including

but not limited to any standards used by the Department of Justice, the Treasury Department, the Internal Revenue Service or the United States Attorney in declining prosecution of similar cases." At the hearing on the pretrial motion, the Court specifically asked the prosecution if there was any Brady material in its files. The prosecution withheld certain letters that could have shown an "expectation of favor" between the prosecution and a government witness. The Court held that under the circumstances, the request was specific.

FIFTH CIRCUIT

United States v. Gaston, 608 F.2d 607, 610-613 (5th Cir. 1979). The defense counsel requested, "any prior statements of witnesses who had testified, including any interview reports

prepared by the FBI agents who investigated the case on FD-302 forms . . . to which he might be entitled. . . ." This was to be a specific request for production of the 302 forms.[6]

EIGHTH CIRCUIT

Scurr v. Niccum, 620 F.2d 186, 188-191 (9th Cir. 1980). The defense re-

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[6] Cf., United States v. Anderson, 574 F.2d 1347, 1351-1355 (5th Cir. 1978) where the following request was held to be general:

> "The recorded testimony of any co-defendant or alleged unindicted co-conspirator before the grand jury which relates to the offense charged in the indictment against the Defendant. Rule 16 (a); . . . All books, papers, documents, photographs, tangible objects, buildings or places in the control or possession of the Government which are material to the defense or intended for use by the Government in its case in Chief or any such items obtained from the Defendant. Rule 16(c)"

quested "all statements and any other evidence contained in police report[s] or County Attorney's files or Sheriff's files which are exculpatory in nature." The defense also made an oral statement at the hearing of the Motion to Produce declaring the name of witness for the State. The prosecution failed to disclose statements of the witness that tended to impeach him. The Court held the request to be specific.

Due to the disparty between the rulings of the circuits, this Court should grant certiorari to resolve this conflict. The State respectfully submits that the District Court applied the correct standard when it ruled that the request was a general one and that the

reasonable doubt test of Agurs should apply.

PROPOSITION II

USE OF THE "MIGHT HAVE AFFECTED" STANDARD OF AGURS BY THE TENTH CIRCUIT IN THE PRESENT CASE SET AN UNREALISTICALLY HICH STANDARD FOR THE STATE TO OVERCOME IN ASSESSING WHETHER THE DEATH PENALTY SHOULD HAVE BEEN IMPOSED WHEN VIEWED IN THE CONTEXT OF THE ENTIRE CASE.

Since the State contends that the discovery request in the present case was general in nature, it also submits that the Court erred in applying the "might have affected" standard to the evidence which supported the imposition of the death sentence. Furthermore, use of the "might have affected" standard as applied in the present case presents an insurmountable burden for the State to overcome on appeal.

The Court held that the withheld evidence "'might have affected' the

jurors, or one of them, in deciding on the death penalty" 730 F.2d at 1352; A. 87). Therefore, the test, as it now stands, for review of a death sentence imposed in Oklahoma when any evidence has been withheld after a defense attorney has made a request for all "statements," is whether the withheld evidence "might" have affected the decision of even one juror.[7]

The State contends that this imposes an unrealistically high barrier to the imposition of the death penalty and goes considerably farther than was contemplated by the Supreme Court in the United States v. Agurs, 427 U.S. 97 (1976) decision, especially when applied

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[7] Oklahoma requires a unanimous jury verdict in imposing the death penalty. Okla. Stat. tit. 21, § 710.10.

to death penalty cases.[8] The State also submits that the Tenth Circuit, despite its denial, has in fact decided that "the Eighth and Fourteenth Amendments guarantee defendants an absolute right to obtain mitigating evidence held by the prosecutor." 730 F.2d at 1352, n. 23; A. 23). As a result of the Court's decision, no prosecutor will risk withholding any evidence in a death penalty case for fear that later some court may subjectly decide that "one" juror "might" have been affected by withheld evidence.

Furthermore, it should be remembered that the Supreme Court in Agurs, stated:

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[8] In Pulley v. Harris, ___ U.S. ___, 104 S.Ct. 871, 881 (1984), the Supreme Court reiterated that "there can be 'no perfect procedure for deciding in which cases governmental authority should be used to impose death.'"

> "The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." 427 U.S. at 109-110.

In Cramer v. Fahner, 683 F.2d 1376, 1383 (7th Cir. 1982), it was held:

> "It would be 'far too restrictive on the state[s]' for a habeas court to vacate a state conviction simply because suppressed evidence, such as a police report 'might have led the jury to entertain a reasonable doubt as to his guilt.'" (Emphasis added).

Additionally, a jury verdict is not constitutionally required in imposing the death penalty. Spaziano v. Florida, ___ U.S. ___, 52 U.S.L.W. 5030, 5033-5035 (U.S. July 2, 1984); Proffitt v. Florida, 428 U.S. 242, 252 (1976). Since a unanimous jury verdict (or even a jury verdict) is not constitutionally required, this too should be taken into consideration before a death sentence

imposed by a state, pursuant to a statutory system enacted by elected officials, is set aside by the federal judiciary.

The State in the present case contends that the Court, for the reasons stated above, should have applied the "reasonable doubt" standard of Agurs in determining whether the death penalty should have been imposed.[9] Therefore, reviewing all the facts of the case, the omitted evidence would not have created a reasonable doubt as to the imposition of the death penalty that otherwise would not have existed. United States v. Agurs, supra, 427 U.S. at 112.

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[9] The "reasonable doubt" standard is also consistent with the Supreme Court's decision in Jackson v. Virginia, 443 U.S. 307 (1979).

The defendant's involvement in the kidnapping and subsequent murder of Mrs. Ashmore and Ms. Brown was so extensive that even if other individuals were involved (a contention seriously undermined by the defendant's repeated refusal to call any of the principal witnesses referred to in the FBI reports) that when viewed in the context of the entire record, a reasonable doubt does not exist as to the appropriateness of the imposition of the death penalty by the jury. The record conclusively establishes that the defendant, at a minimum, contemplated that life would be taken. Enmund v. Florida, 458 U.S. 782, 801 (1982).

For example, the remarks made over the telephone to Mr. Ashmore, contain horrifying threats concerning the life of Mrs. Ashmore. Furthermore, the act

of kidnapping for ransom itself is a crime in which a participant could reasonably foresee that the victim's life would be taken by an accomplice.

Since the record in the present case reveals the overwhelming nature of the Defendant's direct involvement in the kidnapping and murder of Mrs. Ashmore, an independent review of the nondisclosed reports and the subsequent hearings on such, support the view that any nondisclosed evidence would not "create a reasonable doubt that would not otherwise exist," particularly when "evaluated in the context of the entire record." Agurs, supra, 427 U.S. at 112.

The State contends that the Federal District Court was correct in noting that it was significant that the Defendant's attorney did not call or propose to call Ms. Weaver, Mr. Hamilton or Kyle

West the witnesses referred to in the FBI reports, at either the State evidentiary hearing or the requested federal evidentiary hearing. (Order of June 23, 1983, p. 5; Order of June 30, 1983, p. 27).

Therefore, the Tenth Circuit erred when it determined that the death penalty should not have been imposed in the present case.

CONCLUSION

For the reasons stated, it is respectfully requested that the Court grant certiorari and reverse the judgment of the United States Court of Appeals for Tenth Circuit with respect to the setting aside of the death penalty in the present case.

Respectfully submitted,

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